THE

BENCH AND BAR

OF

TEXAS.

BY

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'Tis not in mortals to command success, but
We'll do more, Sempronius, we'll deserve it.

—ADDISON'S CATO.

PUBLISHED BY THE AUTHOR.

ST. LOUIS:
NIXON-JONES PRINTING CO.
1885.

JACOB WAELDER.

The subject of this sketch is a native of Germany and was born in the town of Weisenheim, in the Rhine Provinces, on the 17th of May, 1820. His father was a jeweler, and at the time of his birth his native town, Weisenhiem, was by conquest a part of the first empire of France, but after the downfall of Napoleon I it formed a part of the Rhine Provinces, and is now consolidated with the German Empire. Jacob had at an early age the advantages of the best schools of his native town and also of an excellent gymnasium, which he attended until he was twelve years old. His father was a man of strong republican sympathies, and, being a great admirer of American institutions, emigrated to this country in 1833, and settled in Pennsylvania. Here his son continued his studies in a good school until he reached his fifteenth year; he was then placed in a printing office and two years afterwards was employed as one of the proof-readers in the Constitutional Convention of Pennsylvania convened in 1837. In 1838 he went to Germany, where he remained over two years and completed his general education. In 1841 he returned to America and established a newspaper at Wilkesbarre, Pennsylvania, of which he was the proprietor and editor; but in 1842 began the study of law at that place in the office of Hon. L. D. Shoemaker, and remained under his supervision until he was prepared for the bar. In 1845 he obtained his license and entered upon the practice of law, but the Mexican War was at that time engaging the attention of the country, and Mr. Waelder, catching the inspiration of military enthusiasm, enlisted in the First Regiment of Pennsylvania volunteers and served throughout that war. He was elected a lieutenant of Company I of that regiment, which having embarked at New Orleans landed

below Vera Cruz with the army of Gen. Scott and participated in the storming of that city and the castle of San Juan d'Ulloa, marched with Scott's army into the interior, was then moved forward first to Jalapa and then to the castle of Perote, from which place six companies of the regiment were ordered to Pueblo, where the army was then concentrating. Lieutenant Waelder was appointed adjutant of the battalion composed of the advancing companies. When Gen. Scott moved upon the valley of Mexico this battalion, with small force of cavalry, was left at Pueblo and maintained the siege of that city against a force of four thousand Mexican troops which were joined by four thousand others under General Santa Anna, after the fall of the City of Mexico, until it was relieved by Gen. Joseph Lane in October, 1847. During the siege he was appointed acting assistant adjutant-general by Gen. Childs of the regular army, commanding the garrison, and was several times mentioned for good conduct in the reports of both that officer and the colonel of his regiment.

At the close of this war he returned to the practice of his profession at Wilkesbarre, and in 1850 was elected district attorney of Luzerne County, Pennsylvania, and also brigade inspector of militia; but the failing health of his wife caused him to seek a home in a milder climate, and resigning these offices, in 1852 he removed to Texas and located in San Antonio, which he made his permanent residence, and where he has attained eminent distinction as a lawyer and accomplished gentleman. In 1855 he was elected a member of the Legislature of Texas and was re-elected the two succeeding terms.

As a legislator he was distinguished for his close and watchful attention of the interest of his constituents, and for the ardor and ability with which he advocated every measure calculated to promote the general welfare of Texas. Since his last term in the Legislature, in 1859, he has never sought any political preferment, but has devoted all his energies to a large law practice acquired and sustained by his integrity, ability and success.

He has always been a thorough Democrat and during the

war was a major in the Confederate army and served first as general enrolling officer, and subsequently as assistant purchasing commissary. In 1875 he was a member of the convention which framed the present Constitution of Texas, and exerted a prominent influence in the formation of that instrument, which ended his political career.

Soon after this war, seeing but little hopes of quietude and the peaceful pursuit of his profession amid the disorganization of reconstruction, Mr. Waelder removed to the city of New York and practiced one year in Wall Street in copartnership with Mr. M. C. Riggs, but returned to San Antonio in February, 1868, and formed a copartnership with Hon. Columbus Upson, who has recently been a member of Congress from that district, and this copartnership still continues.

Mr. Waelder has been twice married. His first marriage was with Miss Lizzie Land, of Wilkesbarre, Pennsylvania, in 1849 — an accomplished lady, who died in 1866; and in 1870 he was married to Mrs. Ada Maverick, formerly Miss Ada Bradley, of San Antonio, and this excellent lady has inspired him with much of that spirit of good cheer and contentment which pervades his social ethics and stimulates his professional exertions.

As a lawyer Mr. Waelder is profound and accurate. He thoroughly comprehends the great principles of law established by the wisdom of ages as the proper measures of right and justice among men, and his sound judgment and indefatigable research enable him to apply these with a masterly hand to the affairs of society. He has been especially successful in the application of new and important features and interpretations in civil cases. His unabating industry and methodical habits lead him to a thorough understanding of his cases, and identifying himself with the interests of his clients in all meritorious suits, he sees but one side of a question — the one that has enlisted his exertions.

Among the most notable cases in which he has been engaged before the Supreme Court are the following: I. A. & G. W. Paschal et al. *v.* W. H. Dangerfield et al., 37

Texas, 273. This case involved the question of presumptions of grants and the subject of imperfect titles to lands, and the legal *status* of parties between whom partition has been made; that they must sue separately to recover the possession of land which has been partitioned and to perfect their title, and that this principle applies to suits both at law and in equity. Acklin *v.* Paschal et al. 48 Texas, 14; Myers *v.* Dittmar, Admr., 47 Texas, 373; Daumhauer *v.* Devine, 51 Texas, 480; French et al. *v.* Sternberg et al., 52 Texas, 92; Howard *v.* McKenzie et al., 54 Texas, 171; Horan *v.* Frank, 51 Texas, 401 — involving the nature and character of a mechanic's lien. Loonie *v.* Frank, same, 51 Texas, 406; French et al., *v.* Grenet, 57 Texas, 273. Hector *v.* Knox, Manning *v.* San Antonio Club, N. Y. & Texas Land Co. *v.* Sanchez, not yet reported.

Mr. Waelder has been also engaged in a number of important cases in the Circuit Court of the United States — notably the San Antonio and Bexar County bond cases, and is engaged in a case of considerable importance, which is now pending in the Supreme Court of the United States — the case of Sabanys and wife *v.* Maverick et al., in which he represented the defendants and recovered judgment for them in the Circuit Court. This case involves some of the best business and residence property in San Antonio, comprising eight acres.

The case of Paschal *v.* Dangerfield was in litigation more than twenty-five years, and in the last effort made on motion for a rehearing before the Supreme Court, Judge Waelder, as counsel for the appellants, presented the following observations, in reply to the arguments of the counsel for the appellees, which are of both legal and historical value: —

"We had hoped, that after twenty-five years of litigation, this case was finally disposed of by the action of this court in reversing the judgment of the court below and dismissing the cause. There was no reason to suppose, that after the full review which the case has had and the principles enunciated in the opinion of the court — an opinion which exhausts the subject and leaves nothing open for discussion,

relative to this and similar titles — an effort would be made to induce the court to reconsider its action and reverse its own judgment.

"The effort is made, however, and while we might well leave the opinion of this court to answer the present argument, we will nevertheless offer some suggestions relative to the 'new departure,' which the court is asked to take, and which, if taken, would launch not only this case upon a sea of contest, the end of which can not be foreseen, but would open a source of new litigation in various parts of the State, which has been thought closed by the decision of this case by the present bench, and by the previous decisions of its predecessors.

"The counsel may well say, that he is 'in opposition to every adjudication of every American court upon this subject.' He assumes that he is only apparently so, because 'the law and the reason of the law,' as understood by him, have not been before the courts for consideration.

"We take a different view of the subject, believing that the very point here raised has been passed upon in previous adjudications. Thus in the case of Paschal *v.* Perez, 7 Texas, 348, the counsel for Perez distinctly announces the proposition, that 'the grant passed the fee under the laws of Spain;' and 'the act of Cordero passed the fee.' It will be remembered, that the concession in that case emanated from the same military chief and governor of Coahuila, *ad interim* of Texas; was made at the same place and about the same time as the one now under consideration; the language of one is the language of the other, and in both instances the parties to whom the concessions were made, are referred to the same Intendency for confirmation. The counsel of Perez endeavoring to show, that 'the authority of Cordero is beyond a question;' refers to various decisions of the Supreme Court of the United States, none of which, although a cursory reading may have misled, sustain the position assumed. Thus in the case of Delassus *v.* The United States, 'the concession was made in regular form on the 1st of April, 1795, by Zenon Imdean, Lieutenant-Governor of the western part of Illinois, in

which the land lay, BY SPECIAL ORDER of the Baron de Carondelet, Governor-General of the province; given in consequence of a contract entered into by De Luzieres with the government for the supply of lead.' In delivering the opinion of the court, Chief Justice Marshall says, that 'by the royal order of 1774, the power of granting lands, which had been vested in the Intendente by an order of 1768, was revested in the civil and military governors of the provinces, who retained it until 1798.'

"'The concession is unconditional,' said the court, and it was sustained as title. But while this was done the court clearly points to the change of regulation in 1798, under which a different conclusion would have been arrived at and a different decision made.

"In truth, in all of the cases in which grants made by the government of Spain have been sustained, these grants were made by persons duly authorized and depending on no conditions which had not been performed — they were absolute grants, made by competent authority, and were hence held valid, as they should have been.

"The whole subject is fully reviewed by Mr. Chief Justice Hemphill, in the case of Paschal *v.* Perez, and the conclusion arrived at that the title of Perez was inchoate and imperfect, and that an imperfect title, emanating from a former, and unrecognized by the existing, government, forms no foundation for an action, and can have no standing in a judicial tribunal.

"So in the case of Menard's Heirs *v.* Massey, the Supreme Court of the United States, after reviewing and re-examining the cases previously decided by that court, arrived at precisely the same conclusion, saying: 'From the first act, passed in 1805, Congress has never allowed to these claims (imperfect titles) any standing other than that of mere orders of survey, and promises to give title; and which promises addressed themselves to the sovereign power in its political and legislative capacity, and which must act before the courts of justice could interfere and protect the claims. And so this court has uniformly held.'

"It will be remembered that, in the case last mentioned,

the title presented was one substantially the same as the title presented in this case and that relied upon in Paschal *v.* Perez. And the court held it to be — as this court has held those of Perez and Cubier — inchoate and imperfect.

"Again, in the language of Chief Justice Hemphill: 'Was the act of the Governor (Cordero) final, or was it under the control of the Intendant, depending for its validity upon its confirmation?' Under the law then in force, as understood by the court and by Cordero himself, it is distinctly enunciated that such titles were not valid without confirmation by the political authorities, and that at that time the power to confer absolute titles or grants to lands was vested in the Intendant.

"We might make further extracts from the same case, but the familiarity of the court with its conclusions and reasoning makes it unnecessary.

"The argument of the appellees' counsel endeavors to maintain, that after the 24th day of August, 1770 (should be 1774), the political and military Governors of provinces had the right of granting and distributing Royal lands.

"This is probably true, so far as the provinces of Louisiana and West Florida were concerned, but only as to those provinces. At least so it would seem from the communication addressed to the Intendant of Louisiana (Moralez) on the 22d of October, 1798, and the royal order addressed to Gazoso de Lamos, Governor of Louisiana, on the same day. It was also so regarded by the Supreme Court of the United States in the case of U. S. *v.* Moore, 12 How. 219.

"But it is equally true, that so far as the power had been vested in the Governors, it was recalled by that very order, which reads as follows: —

"'The King has resolved, for the sake of the better and more exact observance of the eighty-first article of the Royal Ordinance for Intendants of New Spain (not the province of Louisiana alone), that the exclusive faculty of granting lands of every class, shall be restored to the Intendnacy of that province, free from the interference of any other authority in the proceedings as established by law (evidently the Regulations of 1754), consequently the power hitherto

residing in the government to those effects, is abolished and suppressed, being transferred to the Intendancy for the future.' (2 White's Rec. 477, 478.)

"On the same day — October 22, 1798 — a substantial copy of this order was transmitted to Morales, the Intendant, for his guidance. (2 White's Rec. 245.)

"Now, this order refers to the thirty-first article of the regulations of 1754, and is made for its better observance in the province of Louisiana. Hence, it would seem that in that province the article mentioned had never been in force, or that it had been recalled, or had not been observed as it should have been. The article read thus: 'The Intendants shall also be the exclusive judges of the causes and questions that may arise in the district of their provinces, about the sale, composition and grant of royal lands, and of seigniory, it being required of their possessors, and of those who pretend to new grants of them, to produce their rights, and institute their claims before the same Intendants,' etc. (2 White's Rec. 69.)

"Again, if the same relaxation of the eighty-first article of the regulations 1754 had occurred in the other provinces of New Spain, then the practice was also 'abolished and suppressed' in such other provinces by the same order of 1798. There is nothing from which relaxation can be inferred, but the order seems intended to correct any abuse or practice in that regard, for it expressly refers to the Intendants of New Spain, and not to him of Louisiana alone, and declares that it is given for the better and more exact observance of the eighty-first article by the Intendants, transferring the power to them for the future.

"It seems that on the 24th of November, 1735, a royal decree was issued, requiring all persons who would enter upon the lands in the provinces, to apply to the king in person (2 White ,62), and that in order to do away with this inconvenience, the ordinance of 1754 was established, by the eighty-first article of which, as we have said before, the power to grant lands was vested in the Intendants of the provinces, which were established by the same ordinance — one of the Intendancies being located at the City of San

Luis Potosi. Then the Intendancy of San Luis Potosi was governed by the ordinance establishing it, and all grants of land within its limits, or confirmations of imperfect titles, must, under those regulations, have emanated from it.

"Regulations, such as those issued by Morales in 1799, may or may not have been made by the Intendant of San Luis Potosi. Whether there were or not, does not appear to be definitely known. We admit, however, that the ordinance of 1754 was binding upon him, and that if a different practice had afterwards prevailed, that ordinance was fully restored and the power to make grants re-vested by the order of 1798. Whether the regulations of 1805, to to which Governor Cordero refers in directing Mrs. Cubier to present her title to the Intendant of San Luis Potosi for confirmation, contains provisions similar to those of Morales, we are not informed, though the only inference that can be drawn from that direction is, that there were such regulations, or, in the language of Chief Justice Hemphill: 'So far as we are informed of the laws then in force, they were not misunderstood, but correctly interpreted by the Governor. The Intendant, in the language of the ordinance, is the exclusive judge of causes and questions arising about the sale, composition, or grant of lands.'

"We maintain, then, that in Coahuila and Texas, they did not have such regulations as those of Morales. They certainly had those of 1754, which are all-sufficient. That they had no treaties with the United States we freely concede; but that fact rather weakens than strengthens this case.

"Nor is it claimed that the royal order of 1798, the regulations of Morales, or the ordinance of 1754, had any extra-territorial force. The principle we contend for, and which has been established and re-affirmed by this court, and all courts where the same question has arisen, falls within the ordinance, the order and the regulation under it; and, it seems to us, that when the counsel for the appellees concedes, as he does, the legal effect of the action of Morales, he gives up the whole controversy.

"He does the same when he says that he is 'strongly for-

tified by the universally accepted doctrine, that a public officer exercising certain powers pertaining to his office, is presumed to be possessed of the power until the contrary is shown.' For when he invokes and applies this presumption to the act of Cordero in making the imperfect title to Mrs. Cubier, he must take it with its entire effect, viz.: that the act was done with all the power vested in him and no more. And that power fell very short of making an absolute grant, or passing the fee. This follows as a necessary sequence, without calling to aid that other doctrine, that the officer is presumed to know the extent of his power. Hence, when Cordero made the imperfect grant in question — knowing that he had not the power to make a full grant — he directed his grantee to repair to the Intendant for its confirmation.

"Whatever ceremonies may have been performed by Cordero, or by the alcalde under his orders, in granting such title as he could grant, whether such ceremonies were idle or otherwise, can not affect the character of the title. That can not gain strength by the declaration in the instrument, that as evidence of true possession, Mrs. Cubier was taken by the hand and walked over the two leagues; that she plucked grass, washed earth, etc., etc. Whether any or all of these were actually done or not — although all these things were declared to have been performed in the name of the king, her title would, nevertheless, remain an imperfect one, requiring confirmation, which was never obtained.

"That Mrs. Cubier could have defended her possession against a trespasser, we do not deny. She could have done the same under a resignardo, which gives protection to a claimant until a survey can be ordered, or until the title of possession issued by an authorized commission. So she could under a lease; same under a naked possession, though it might not have been lawful at its inception.

"Counsel complains that this is called an Amparo. Now, an Amparo is given to one in possession, and secures him in that possession; when issued to a claimant, it protects him in his claim. In what is the title, presented in this

case, different? It amounts, at best, to an incipient, inchoate or imperfect title — which is conceded, by the counsel, to be its character — though he makes the concession only for the sake of the argument. But he argues himself into a wrong conclusion. He contends that it would require an act of the sovereighty, assuming the possession, or the manifestation of a desire to do so, while it is held in all the adjudicated cases, that the title remains in the sovereighty of the soil until by some act of the political authorities, they have parted with it.

"There is one view of this case, which we will present for what it may be worth. Cordero issues the imperfect title to Mrs. Cubier as the Governor of Coahuila, though he represents himself also as Governor *ad interim* of Texas. This might raise a question as to his authority so to represent himself; for it is a historical fact, that Coahuila and Texas were not united until the adoption of the Constitution of 1824.

"However Texas may have been regarded by the king and people of Spain, there are some scraps of history in connection with its occupation and first settlement, from which it might well be inferred, that the regulations made for the government of Louisiana and Florida would be more applicable to Texas than any of the other Spanish provinces now constituting Mexico.

"Thus, for instance, the first European visitors to the shores of Texas were a colony of French emigrants led by La Salle, who landed in Matagorda Bay, and erected a fort (Fort St. Louis) on the La Vaca. He was murdered in 1687. In 1689 Capt. De Leon, a Spanish officer, was dispatched to the La Vaca to hunt out the French. In 1691 a Spanish Governor of the region was appointed, but in 1693, owing to the hostility of the Indians and other causes, the settlement was abandoned. The Spaniards at that time had settlements at El Paso and at San Juan Bautista, both on the right bank of the Rio Grande, but both now within the limits of Texas. In 1714 the French again attempted a settlement within its limits, and Crogat, to whom Louis XIV. had granted the whole of Louisiana, sent an expe-

dition, which penetrated from the Sabine to the Rio Grande.

"Efforts were made by both France and Spain, with varied success, to hold the territory, until in 1763 the feud was finally terminated by the cession of Louisiana by France to Spain. When, in 1803, Spain re-ceded Louisiana to France, the latter ceded it to the United States, and 'as there had been no well defined boundary between Louisiana and the Spanish possessions west of it, a controversy at once ensued between Spain and the United States,' the latter claiming to the Rio Grande. This controversy continued until 1819, when in the treaty for the cession of Florida the country west of the Sabine was guaranteed to Spain. How distasteful this treaty was to the people of the Western and Southern States of the Union, is shown by subsequent history — by the invasion gotten up in those States.

"It will be remembered that this claim of the United States to the Rio Grande was much discussed about the beginning and during the war with Mexico, and one of the reasons why the annexation of Texas was justified — or rather advocated — was that Texas in reality was a portion of Louisiana.

From this part of our early history, it appears that Spain herself did not obtain a clear, undisputed title to the Territory of Texas until its cession of Florida in 1816. And from this it may also be inferred, that although Spain nominally or really valued the Province it did so in connection with its possession of Louisiana, and after the cession of the latter, with Florida, until finally its claim to Texas was confirmed, its title acknowledged, and the Province was united with Coahuila in 1824, as before stated.

"If that part of our history leads to the inference we suggest, then the regulations of 1798 were clearly applicable to Texas. If, on the other hand, our inference should be thought to be incorrect, the royal regulations of 1754, and all that has been said in relation to that part of the case, necessarily lead us to the same conclusion: that the title of Mrs. Cubier was imperfect, and as such can have no standing in a judicial tribunal; that it was never confirmed,

as the law of the time required, and that, therefore, no recovery can be had under it.

"While we may, and do, give due credit to the ingenious and able argument of the counsel, and while we appreciate his diffidence in asking the court to take the 'new departure' heretofore alluded to, we must insist that we have failed to discover any good reason why the change desired should be made.

"Believing that the court will adhere to its decision we deem it unnecessary — perhaps improper — to say anything in regard to the 'other bill of exceptions' alluded to by the counsel for the appellees.

"In relation to the defendants who have not appealed, we will simply say — lest it might be thought there was slight error in the judgment of this court — that the defendants, against whom the judgment of the District Court was rendered, were Geo. W. Paschal, the estate of I. A. Paschal, and Gideon Lee. These have all appealed. There were several other defendants — settlers on the land — against whom there was no judgment, but a judgment in their favor, upon the plea of the statute of limitations. These, of course, did not appeal. And as the cause is dismissed and they can not be troubled again by new litigation, there is no reason why the judgment should be changed as to them."